No. 80-1105

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

LOUIS E. WOLFSON,

Petitioner-Appellant,

–vs–

JOHN D. BAKER, JR., etc., et al.,

Respondents-Appellees.

On Writ of Certiorari to
the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED:

Has the United States Court of Appeals for the Fifth Circuit denied Wolfson due process of law in affirming an alternative holding of the United States District Court for the Middle District of Florida granting Reynolds' motion for summary judgment because the doctrines of collateral estoppel and *in pari delicto* barred Wolfson from recovering damages against Reynolds in this action since Wolfson knew about the registration requirement he claimed Reynolds failed to advise him about, as necessarily had been determined by the jury during Wolfson's prior criminal conviction for violating the federal securities laws and during the affirmance on appeal of that conviction, and when Wolfson's due process claim is based solely on his filing of a separate petition for writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the denial of his second writ of error *coram nobis* collaterally attacking the validity of his affirmed criminal conviction?

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GROUNDS ON WHICH JURISDICTION IS OPPOSED

Petitioner has failed to demonstrate that special and important reasons for granting certiorari as set forth in Rule 17.1(a) of this Court are present in this case.

SUPREME COURT RULES

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Rule 21

THE PETITION FOR CERTIORARI

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

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On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

On September 29, 1967, long before the instant civil action began, Wolfson was criminally convicted in a jury trial in the United States District Court for the Southern District of New York for failing to register certain stock sales in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e. *Wolfson v. Baker*, 444 Supp. 1124, 1127 (M.D. Fla. 1978). This conviction was affirmed on December 27, 1968. *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

Before the appeal of his conviction was completed, Wolfson moved for a new trial on the basis of newly discovered evidence. On December 2, 1968, after a lengthy evidentiary hear-

ing, Judge Palmieri, who had presided over Wolfson's original trial, denied the motion. *United States v. Wolfson*, 297 F. Supp. 881 (S.D.N.Y. 1968). Judge Palmieri's ruling was affirmed on July 1, 1969. *United States v. Wolfson*, 413 F.2d 804 (2d Cir. 1969). No petition for writ of certiorari was filed following that appellate decision.

On December 17, 1970, Wolfson began this civil action by filing a one count complaint against defendants in the United States District Court for the Middle District of Florida. After several initial complaints were dismissed, Wolfson filed a third amended complaint on February 14, 1975. Wolfson's third amended complaint contained four counts seeking damages from defendants for their alleged failure to advise Wolfson of the registration requirement he had been convicted of violating. Defendants moved to dismiss or for a more definite statement of all four counts or, alternatively, for entry of a summary judgment.

On May 16, 1975, Wolfson filed his first petition for writ of error *coram nobis* to collaterally attack his criminal conviction. Judge Palmeri denied the petition on July 26, 1976. *United States v. Wolfson*, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. July 26, 1976) (Appendix "A"). Judge Palmieri's order was affirmed on June 3, 1977. *United States v. Wolfson*, 558 F.2d 59 (2d Cir. 1977). No petition for writ of certiorari was filed following that appellate decision.

On January 20, 1978, Judge Melton of the United States District Court for the Middle District of Florida rendered his decision in the instant civil action. Judge Melton granted defendants' motion for summary judgment as to Counts I and II of the complaint, and dismissed Counts III and IV with prejudice. *Wolfson v. Baker*, 444 F. Supp. 1124, 1136-1138 (M.D. Fla. 1978). On August 14, 1978, Judge Melton's decision was

affirmed, with summary judgment being approved on the basis of the alternative holding which had applied the doctrines of collateral estoppel and *in pari delicto*. *Wolfson v. Baker,* 623 F.2d 1074, 1081-1082 (5th Cir. 1978), *reh. denied*, Oct. 6, 1980.

On February 28, 1980, Judge Gagliardi denied a second petition for a writ of error *coram nobis* which Wolfson had filed collaterally attacking his criminal conviction. *United States v. Wolfson,* Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. Feb. 20, 1980) (Appendix "B"). This decision was affirmed on appeal from the bench in open court without written opinion on July 25, 1980, and on September 18, 1980, Wolfson's petitions for rehearing and for rehearing *en banc* were denied.

On December 17, 1980, Wolfson filed a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit in case number 80-998 to challenge the affirmance of Judge Gagliardi's denial of his second petition for a writ of error *coram nobis*. Wolfson filed the instant petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on January 2, 1981.[1]

SUMMARY OF ARGUMENT

The petition for writ of certiorari in this case should be denied because petitioner fails to cite even one case or principle with which the well reasoned opinion of the United States Court of Appeals for the Fifth Circuit conflicts. Petitioner's sole basis for claiming that he has been denied due process of law is his filing of a petition for writ of certiorari to re-

1 The foregoing recitation does not exhaustively list all of the opinions generated by Wolfson in litigation arising subsequent to his criminal conviction. *See also In re Wolfson*, 453 F. Supp. 1087 (S.D.N.Y. 1978) (motion for recusal denied; motion for leave to take depositions denied; motion for disclosure of grand jury testimony granted).

view the affirmance of the denial of his second writ of error *coram nobis* collaterally attacking the prior criminal conviction and affirmance, which conviction is the foundation for the application of the doctrines of collateral estoppel and *in pari delicto* in this case. However, petitioner's repeated discretionary collateral attacks do not alter the issues actually litigated during his criminal conviction, and the application of the foregoing doctrines in this case was entirely correct.

ARGUMENT

Wolfson's sole reason for petitioning this Court in this case is the "pendency" of his petition urging this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit regarding the denial of his second petition for a writ of error *coram nobis* collaterally attacking the validity of his criminal conviction. Wolfson argues that the pendency of that petition for writ of certiorari invalidates the district court's and the Fifth Circuit's application of the doctrines of collateral estoppel and *in pari delicto*. Wolfson asserts that because he has filed a petition for writ of certiorari seeking review of the denial of his second petition for writ of error *coram nobis*, the instant petition for certiorari should be granted because the Fifth Circuit Court of Appeals in some unarticulated manner has denied him due process of law by "indulging the assumption" that he has had a full and fair opportunity to "litigate the knowledge issue in the trial itself or the subsequent *coram nobis* proceedings which have not yet been completed." To the contrary, however, the Fifth Circuit has indulged no assumption whatsoever, as the knowledge issue *was* exhaustively litigated. The Fifth Circuit's decision was entirely justified and correct and provides no basis for the current petition.

There is a fundamental flaw in Wolfson's logic. The pendency of Wolfson's *coram nobis* proceedings in New York has

nothing whatsoever to do with the validity of the Fifth Circuit's holding that the district court correctly ruled that the doctrines of collateral estoppel and *in pari delicto* bar Wolfson from recovering against defendants in the instant civil action since it necessarily was determined by the jury verdict in Wolfson's criminal conviction that Wolfson had actual knowledge of the registration requirements of the securities laws. If Wolfson's position was correct and carried to its logical conclusion, collateral estoppel could never apply in a civil action which followed the determination of an issue in a criminal conviction, since petitions for writs of error *coram nobis* collaterally attacking criminal convictions, being purely discretionary, may be filed long after sentences have been served, year after year, for any or for no reason whatsoever. *See* fn. 4 of Judge Gagliardi's opinion at pp. 9b-11b, Appendix B., *infra*. That such petitions may repeatedly be filed does not alter the issues that actually were litigated and decided in the conviction they attack.

It is perhaps because Wolfson's contention is so far-fetched that Wolfson cites no authority whatsoever in support of it. Nor does Wolfson comply with this Court's Rule 17.1(a) by demonstrating where the well reasoned decision of the Fifth Circuit Court of Appeals — or even a single case therein cited — is in conflict with another appellate decision. Wolfson thus flagrantly disregards the well established "conflicts" considerations governing review on certiorari set forth in that rule. However, because Wolfson cited Rule 17.1(a) in seeking to establish jurisdiction in this Court, Wolfson instead tries to invoke this Court's "power of supervision," yet he fails to cite even a single case or principle which indicates that the Fifth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court" as to justify the invocation. That Wolfson has so completely failed to present an accurate, brief

and clear presentation of arguments supported by persuasive legal authorities suffices for this Court to deny his petition under Rule 21.5 (1980).

CONCLUSION

For all of the foregoing reasons, Wolfson's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - -X

UNITED STATES OF AMERICA
against
LOUIS E. WOLFSON,
Defendant

66 Cr. 720
(ELP)

- - - - - - - - - - - - -X

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PALMIERI, J.

This is a voluminous petition to set aside the judgment of conviction of Louis E. Wolfson entered on November 28, 1967, after a jury found him guilty, on September 29, 1967, of violating and conspiring to violate the federal securities laws. *United States v. Wolfson*, 66 Cr. 720 (the Continental Enterprises case). The conviction was affirmed. *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), and certiorari denied, 394 U.S. 946 (1969). A motion for a new trial on grounds of newly discovered evidence was made on October 9, 1968. Following a lengthy evidentiary hearing, the motion was denied, 297 F. Supp. 881 (S.D.N.Y. 1969), and the denial was affirmed by the Second Circuit, 413 F.2d 804 (1969).

The petitioner was indicted, tried and convicted on other charges, *United States v. Wolfson*, 66 Cr. 832 (the Merritt-Chapman & Scott case), but the conviction was reversed by a divided court, 437 F.2d 862 (2d Cir. 1970), and subsequent trials of the petitioner resulted in jury disagreements and eventually in a nolle prosequi.

The Procedural Status of the Petition

Due to the complexity of the proceedings had and the multiplicity of the papers involved on this petition, it will clarify matters to trace briefly the activities that have occurred since the filing of this petition.

Contrary to the local rules of this court, the petitioner sought unsuccessfully to place this petition, filed May 16, 1975, before the Chief Judge of this court, or a judge other than the trial judge. He addressed it specifically to the Chief Judge, who refused to accept it, and then attempted to have it put on the court's motions calendar in Part I. Having failed in this maneuver, the petitioner filed on June 18, 1975, a motion for recusal of this Court. This motion was

denied in an opinion dated July 23, 1975, on substantive grounds as well as on the procedural grounds that the affidavit by petitioner and the certificate by his counsel, as required by 28 U.S.C. § 144, were not supplied.

By letter dated July 24, 1975, the Court gave certain directions to petitioner's counsel. The letter noted that the petition papers gave an impression of lack of familiarity with the record in this case and thus vastly complicated the burden on the United States Attorney and on the Court. Petitioner's counsel was asked to submit an affidavit stating that he had made a conscientious study of all relevant documents referred to in the petition, identifying which of the petition's points had and which had not been previously litigated, and noting which points related to the Continental Enterprises case and which to the Merritt-Chapman case. The purpose of these directions was to bring within a manageable compass petitioner's wide-ranging and partially repetitive allegations.

On August 21, 1975, petitioner filed a motion for reconsideration of the motion for recusal. In the papers submitted therewith, the petitioner indicated his intent to ignore the directions contained in the Court's letter of July 24, cavalierly disposing of the errors in the petition by stating that "they will be pointed out by the Government and taken into account by the Court."

The Court, in an opinion dated September 16, 1975, granted the request for reconsideration and denied the motion both on substantive grounds and for failure to remedy the procedural deficiencies. The Court reiterated its directions and stated its intent to dismiss the petition if counsel refused to comply.

On November 7, 1975, the petitioner's counsel filed an affidavit stating he had made a review of some of the

documents but that he could not comply with the directions fully, alleging that the court's records were in shambles. Although the Court had pointed out in one of its interim opinions that there was no conviction or judgment in the Merritt-Chapman case and that a *coram nobis* petition could not be properly availed of in that proceeding,[1] the attorney for the petitioner stated that, notwithstanding the Court's directions, he did "not find it feasible to assign most 'points' to either the Continental case (66 Cr. 720) or the Merritt-Chapman Scott case (66 Cr. 832) exclusively as most 'points' apply in one degree or another to both cases."

The Government answered this affidavit on January 12, 1976, and the petitioner replied to the Government's answer on February 6, 1976.

On February 9, 1976, the Court filed an opinion directing the petitioner's counsel to comply with its prior order and to submit information as to which documents in the court's records he claimed were missing or unavailable. The purpose of the latter directive was to clarify what documents, if any, were missing or unavailable, to help locate them, and to clear the petition of collateral issues.

On March 8, 1976, petitioner's counsel sent the Court a letter which indicated that he did not intend to comply with the Court's outstanding directives. Consequently, the Court, on March 22, 1976, noting this, ordered the Government to submit its answer on the merits of the petition so that the Court could proceed to a disposition of the matter.[2]

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[1] The petition was filed in the Continental case only, Docket No. 66 Cr. 720.

[2]Since this order took the form of a letter to all counsel and reference is made in it to petitioner's counsel's letter of March 8, 1976, a word of explanation is necessary. The first paragraph of this letter referred to "a transcript of the February 19 meeting in chambers." This meeting was necessitated by the circulation of a scurrilous letter by the petitioner,

Thereafter, on April 8, 1976, the petitioner's counsel sent the Court a letter that can only be described as inflammatory and which indicates a tendency to misstate or selectively overlook facts of record. For example, the letter upbraided the Court for not having required the Government to answer the petition when just such an order had been entered the previous month.

By this letter, counsel also sought to move for an order permitting interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Counsel was informed that this should be done by formal motion in accordance with the rules of the court.

The Government filed its answer together with affidavits by Paul R. Grand and Paul B. Galvani on April 20, 1976. The petitioner then requested and was granted permission to reply to the Government, which he did on May 10, 1975. The Government then requested an opportunity to submit a supplemental answer. The Court reluctantly granted this request because the petitioner had used the opportunity for reply to inject new matters into the proceeding and to make new factual allegations. The Government's supplemental

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while the petition was *sub judice*, covering about 27 printed pages in which he accused the trial court of conducting "kangaroo" proceedings, of having shown favoritism to highly publicized criminals and mafia figures, and of having engaged in numerous other misdeeds. He also accused the prosecutor and an official of the S.E.C., as well as the trial court, of participating in a "scheme to frame" him and of "railroading" him, adding that he could fully document his charges, inviting a lawsuit if he could not prove them, and asserting his financial responsibility and lack of immunity. This letter has been placed under seal and made part of the record in these proceedings. At the February 19th meeting petitioner's counsel declined to concede that this letter was either libelous or scurrilous. The letter, addressed to the Editor of the New York Times, was circulated to two other New York daily newspapers, and to a number of persons occupying positions of importance in the legal profession and in Government.

answer was filed on June 1, 1976, together with affidavits by Michael F. Armstrong, Angus Macbeth, William A. McRitchie and Robert M. Morgenthau.

The Petition Should be Dismissed for Failure to Follow the Court's Directions

Apart from anything else that might be said hereafter, petitioner's counsel has acted in flagrant disregard of the Court's directions, has chosen to proceed as if many of his charges had never been litigated, has made scattershot and broadside attacks on two criminal proceedings although only one of them ended in a judgment of conviction and has any pertinence to this petition. He has shirked his responsibility for clear and precise argument, has sought to place the burden of identifying and correcting his misstatements on the Court and the United States Attorney. Because of the disregard of this Court's directions, this Court concludes that there is sufficient basis to deny the petition with prejudice. Rule 41(b), Fed. R. Civ. P. *See Harris v. Nelson*, 394 U.S. 286, 299 (1969); 28 U.S.C. § 1651.

However, notwithstanding this conclusion the Court hereinafter discusses the petitioner's allegations in order to demonstrate that there are additional and persuasive grounds for the denial of the petition.

The Motion for Recusal

The opinions and orders of July 23, 1975, and September 16, 1975, disposed, among other matters, of the petitioner's motion for recusal of this Court. All that can be said that is relevant to this issue has been set forth in these two opinions and the matter need not be discussed again here, except to say that this Court reaffirms in every respect all that was there set forth. It should be noted that item (b) of petitioner's Motions for Discovery was satisfied by Appendix A to the opinion of July 23, 1975. The same opinion disposed of item (g) of the Motions for Discovery.

The Standards Governing a Petition for a Writ of Error Coram Nobis

At the outset, a review of the legal standards which apply to a petition for a writ of error *coram nobis*, and thus to all of petitioner's points and allegations, is in order. This is done so that it will not be necessary to restate and apply these standards to each of the numerous issues petitioner raises.

The writ of error *coram nobis* is an extraordinary remedy to be applied only under the most compelling circumstances to correct errors of the most fundamental character. *United States v. Morgan*, 346 U.S. 502, 512 (1954); *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963); *United States v. Malinsky*, 310 F. Supp. 523, 524 (S.D.N.Y. 1970).

> Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.

United States v. Morgan, supra, 346 U.S. at 511.

In considering such a writ, a presumption of regularity attaches to the challenged proceedings and the burden of overcoming that presumption is placed on the petitioner. *United States v. Morgan, supra*, 346 U.S. at 512; *Bruno v. United States*, 474 F.2d 1261, 1263 (8th Cir. 1973); *Ybarra v. United States*, 461 F.2d 1195, 1198 (9th Cir. 1972); *United States v. Cariola, supra*, 323 F.2d at 184.

The function of the writ is to correct mistakes of fact not law. *Bronson v. Schulten*, 104 U.S. 410 (1881). Even then, the mistakes of fact must not be attributable to the negligence of the petitioner and must be of such a fundamental character as to render the proceeding itself irregular and invalid. *United States v. Morgan, supra*, 346 U.S. at 507; *United States v. Mayer*, 235 U.S. 55, 68 (1914); *Moon v.*

United States, 272 F.2d 530, 532 (D.C. Cir. 1959). The purpose of the writ is "to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment." *Allen v. United States,* 162 F.2d 193, 194 (6th Cir. 1947).

Issues that have already been adjudicated upon trial or appeal may not be raised in a collateral attack, whether that attack be a *coram nobis* petition, *Murgia v. United States,* 448 F.2d 1275, 1276 (9th Cir. 1971), *Jackson v. United States,* 394 F.2d 114, 115 (5th Cir. 1968), or a petition under 28 U.S.C. § 2255 which is the modern equivalent of a *coram nobis* petition, *Meyers v. United States,* 446 F.2d 37 (2d Cir. 1971); *United States v. Thompson,* 261 F.2d 809, 810 (2d Cir. 1958). As a necessary corollary to this rule, it is also clear that issues plainly available for consideration at trial or on appeal may not be raised. *Williams v. United States,* 463 F.2d 1183, 1184 (2d Cir. 1972), *aff'g,* 334 F. Supp. 669, 671 (S.D.N.Y. 1971), *cert. denied,* 409 U.S. 967 (1972).

Petitioner is entitled to an evidentiary hearing only if he alleges facts that would support a claim of constitutional dimensions, *Smith v. O'Grady,* 312 U.S. 329 (1941) and puts some material issue of fact into dispute. *Walker v. Johnston,* 312 U.S. 275, 284-85 (1941): *United States v. Carlino,* 400 F.2d 56, 58 (2d Cir. 1968), *cert. denied,* 394 U.S. 1013 (1969); *United States v. Tribote,* 297 F.2d 598, 600 (2d Cir. 1961). The Court is not obliged to accept as facts mere conclusory allegations asserted by the petitioner or his counsel. *Accardi v. United States,* 379 F.2d 312, 313 (2d Cir. 1967); *United States v. Tribote, supra,* 297 F.2d at 601.

Wolfson's petition has failed to meet these standards.

The Issues Already Litigated

Petitioner's counsel has conceded that a number of issues have already been litigated and therefore can form no valid

part of the basis for this petition. The Government is quite correct, therefore, in ruling out of these proceedings the following issues: a) alleged intimidation of witness Henry Steger; b) alleged discriminatory prosecution; c) change of venue; and d) alleged judicial bias and prejudice.

The "Slight Acquaintance" of the Foreman of the Grand Jury with the Trial Judge

The petitioner states that the foreman of the grand jury which indicted him has stated that he had a "slight acquaintance" with this Court. This Court has specifically denied any recollection of this grand juror or of any evidence of any connection with him in its opinion of July 23, 1975. There is no demonstration of the factual basis upon which this statement is based. Petitioner has been unable to obtain an affidavit from the foreman and apparently is no longer pressing this point. In his affidavit dated September 15, 1975, petitioner's counsel describes a meeting with the foreman but does not mention this issue. The foreman, in his affidavit submited by the Government, does not mention it.

Even if it were true that the foreman had a "slight acquaintance" with this Court, that would not entitle Wolfson to any relief. This Court did not empanel the grand jury or select its foreman. See Opinion of July 23, 1975, at 4. Wolfson's "fascinating questions" are so baseless and farfetched as not to warrant comment much less an evidentiary hearing.

Allegations Regarding the Grand Jury

In addition to petitioner's allegations concerning the trial court's role in the grand jury proceedings, which was shown to be nonexistent in prior opinions, petitioner raises a number of other issues concerning the grand jury. These include the selection of the foreman, the relationship of the foreman

to the United States Attorney, and to the Government's trial counsel, and the voting of a true bill.

As to petitioner's question whether the indictment was actually voted upon by the grand jury, the grand jury record book for the August 9, 1966 Special Grand Jury shows that the true bill in this case was voted on September 19, 1966, at which time 19 grand jurors were present and voted unanimously in favor of this true bill. In addition, attacks on an indictment and the institution of prosecution must be raised before trial. Rule 12(b)(1) and (2), Fed. R. Crim. P. Petitioner attacked the grand jury at the proper time but did not raise this issue. It is foreclosed to him now.

Petitioner's claims regarding foreman McRitchie require somewhat more comment. Apparently McRitchie knew Michael Armstrong, the Assistant United States Attorney in charge of presenting this case to the grand jury, and Robert M. Morgenthau, the United States Attorney at that time. Petitioner claims that McRitchie "admitted" knowing Morgenthau "well" and Armstrong "intimately." Petitioner further claims that:

> McRitchie has said that he was "concerned" when Michael Armstrong walked in the jury room to present the Wolfson cases. His concern led him to go hurriedly to see his friend, Morgenthau, to whom he explained the situation. According to McRitchie, Morgenthau said that he did not think his intimate friendship with prosecutor Armstrong was "justification for my being relieved."

Petitioner does not say when, where or to whom McRitchie made this "post-trial admission." The only support petitioner offers for his version of this matter is an affidavit by his counsel dated September 15, 1975. In the affidavit, counsel says he visited McRitchie who "acknowledged that he had been a life-long and intimate friend of Michael Armstrong" and said that, because he thought the situation might be

improper, "he went to his friend, Robert Morgenthau" who "assured him that it was 'alright.'"

Petitioner's counsel makes much of what he terms the "life-long and intimate" friendship between McRitchie and Armstrong but said he had "no way to force Mr. McRitchie to confirm this by way of affidavit." In point of fact McRitchie denied such a relationship. Additionally, Mr. McRitchie resisted the thinly veiled threat of public embarrassment made by petitioner's counsel.[3]

The petitioner's and his counsel's views of the matter are in contrast to statements in the affidavits of McRitchie, Armstrong and Morgenthau submitted by the Government.[4]

Morgenthau recalls meeting McRitchie two or three times with Morgenthau's father at the bank where McRitchie worked and then, after the sitting of the grand jury in question, several times as trustee on matters involving his father's estate. He states: "This was a business relationship, and I was not a personal or social friend of McRitchie." He further states that, apart from telling Armstrong that he thought it was proper for McRitchie to serve on the grand jury, he "had no conversation with or about McRitchie concerning any grand jury matter," and did not personally appear before the grand jury in question.

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[3]See the letter of petitioner's counsel to McRitchie, dated July 9, 1974, attached to McRitchie's affidavit.

[4]These three affidavits, plus the affidavit of Assistant United States Attorney Angus Macbeth, answer the questions posed by petitioner as a basis for items (a) and (c) of his Motions for Discovery. Therefore, those requests for discovery are denied. Moreover, petitioner's request for the entire grand jury minutes, as most of his other requests, is a dragnet spread to gather information to add to the irrelevant and immaterial matter that already bloats his papers. Petitioner has not justified any discovery at this late stage regarding his fiercely contested and thoroughly litigated conviction, particularly since he admits that he has not raised a single issue that rises to the constitutional significance necessary for relief.

Armstrong says that McRitchie's son and he were classmates during the last few years of grade school and through high school. They were "close friends" in the fourth or fifth grades of grammar school and they thereafter saw less of each other and "grew to have different circles of friends." He states that "almost all" of his occasional contacts with McRitchie were during grade school and "all of them were in passing." Between graduation from high school in 1950 and the time the grand jury was convened, Armstrong says he may have seen McRitchie "briefly on, at most, two or three occasions."

McRitchie's affidavit confirms in detail Morgenthau's and Armstrong's descriptions of their relationships to him. He states that his "relationship to [Morgenthau] was a business one rather than one of personal friendship," and that "[i]t is inaccurate to describe Armstrong as 'a life-long and intimate friend of mine.'"

McRitchie also states that he was visited by investigators on November 9, 1970, and again on July 2, 1974, regarding his service on the grand jury in question. One or both of these visits presumably form the basis of what petitioner has set forth as McRitchie's "post-trial admission[s]." If McRitchie's statements during those visits were the same as the statements in his affidavit – the Court assumes this to be the case, having no reason to think otherwise – then they become very significant. They show the extent to which petitioner has gone in abstracting from the facts in order to make assertions in support of his position. He has started with a few basic facts and drawn therefrom conclusions which, although they are not inconsistent with these facts, find no direct support therein. The most obvious example is the inflation of the few casual meetings many years before between McRitchie and Armstrong into "a life-long and intimate friend[ship]." This tendency to hyperbole has

constrained the Court to subject all of petitioner's allegations to the utmost scrutiny.[5]

In any event, petitioner has made an insufficient showing to obtain relief on this issue. In the Second Circuit, one seeking to upset his conviction on the ground if impermissible bias of a grand juror must show actual prejudice, not mere speculation. *United States v. Remington*, 191 F.2d 246, 252 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952). On a *coram nobis* petition this showing must overcome the presumption of regularity in the proceedings of the court, as noted earlier.

Courts have consistently rejected challenges to the impartiality of grand jurors where direct proof of undue influence was lacking. *Castle v. United States*, 238 F.2d 131, 135-36 (8th Cir. 1956); *United States v. Remington, supra; United States v. Anzelmo*, 319 F. Supp. 1106, 1113-14 (E.D. La. 1970); *United States v. Brandt*, 139 F. Supp. 349 (N.D. Ohio 1955); *United States v. Fujimoto*, 102 F. Supp. 890 (D. Ha. 1952); *United States v. Smyth*, 104 F. Supp. 283 (N.D. Cal. 1952). Here, petitioner has presented no more than speculation that foreman McRitchie was improperly influenced by his prior associations with Armstrong and Morgenthau. No actual prejudice has been shown and McRitchie himself pointedly denies any prejudice, bias or undue influence.

Even if petitioner could show that McRitchie was biased, he would be entitled to no relief. "[T]he majority rule is that a defendant has no constitutional right to an impartial grand

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[5]Following the procedure for a petition pursuant to 28 U.S.C. § 2255, the Court has not used the Government's affidavits as a basis for finding any of petitioner's allegations to the false, though it does rely on them in assessing the sufficiency of petitioner's and his counsel's affidavits. *United States v. Franzese*, 525 F.2d 27, 31 (2d Cir. 1975) and cases cited there.

jury." *United States v. Archer*, 355 F. Supp. 981, 988 (S.D.N.Y. 1972). *Accord, Gorin v. United States*, 313 F.2d 641, 645 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1965); *United States v. Anzelmo, supra; United States v. Knowles*, 147 F. Supp. 19 (D.D.C. 1957); *United States v. Smyth, supra*. An indictment will stand as long as it was voted by 12 grand jurors after deducting those not legally qualified, Rule (6)(b)(2), Fed. R. Crim. P. Petitioner's claims do not warrant dismissal of the indictment here because this indictment was voted by 6 more grand jurors than the requisite 12 even if McRitchie is considered legally or otherwise disqualified. *United States ex rel. McCarin v. Thompson*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944) (L.Hand, J.). *Accord, Castle v. United States, supra; United States v. Anzelmo, supra; United States v. Fujimoto, supra*. This rule of law also forecloses petitioner's claims regarding McRitchie's selection to be on the grand jury.

Petitioner suggests that McRitchie's position as foreman afforded him influence of such magnitude that bias on his part would necessarily infect and invalidate the entire grand jury process. This contention must be rejected because there is no showing that McRitchie did exercise undue influence and no reason to believe that he may have, given his direct denial thereof. An indictment is merely an accusation. Since there stands between this accusation of petitioner and his subsequent conviction the unanimous finding beyond a reasonable doubt of a petit jury of 12, there is no reasonable basis for granting petitioner relief on this basis.

Nor is there a basis for an evidentiary hearing on this issue. The hearsay and assertions put into the record by petitioner and his counsel do not qualify as proper evidential material that might warrant a hearing. *D'Ercole v. United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 995 (1966). *See United States v. Franzese*, 525 F.2d 27 (2d

Cir. 1975). See also the authorities cited earlier in this opinion. Given the extensive effort of petitioner to obtain evidence on this issue, as revealed by the McRitchie affidavit and the attachment thereto, one may assume he has put forth all material evidence in his possession. Not only is this Court convinced that petitioner could not prove the allegations he has made on this issue, but, taken as true, they are insufficient as a matter of law to warrant the relief he seeks.

The Alleged Threats to George B. Green

Here a stockbroker who was a grand jury witness is alleged to have been threatened by two United States Attorneys, Michael Armstrong and Paul Galvani. The alleged incident involving Mr. Galvani took place in 1968, after the conviction here sought to be vacated, and involved the *Merritt-Chapman* case which has no relevance to this proceeding. The incident allegedly involving Mr. Armstrong was nothing more than a reminder to a prospective grand jury witness that he faced the penalties for perjury if he lied. Not only is there no showing of a threat, Green, in his affidavit, Exhibit VI(A), gives no indication, nor is there any other evidence, that Green's testimony was in any way impaired or affected. Additionally, there is nothing to indicate that Green was not available to Wolfson as a witness at the trial.

Petitioner's Attack Upon His Trial Counsel

Petitioner claims his counsel, Mr. Gould and Mr. Glickstein, were either grossly negligent or disloyal "or some of each." He states the test for gross negligence to be "ineptitude . . . so extensive that the entire proceedings were a farce and a mockery of justice . . ." citing, *inter alia, United States ex rel. Boucher v. Reinke,* 341 F.2d 977 (2d Cir. 1965) and *United States v. Wight,* 176 F.2d 376 (2d Cir. 1949).

He further states that the sixth amendment right to effective assistance of counsel has been denied due to disloyalty or conflict of interest on the part of counsel only when "the circumstances . . . demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client, *Robinson v. United States*, 448 F.2d 1255 (8th Cir. 1971)."

Petitioner attempts to show ineffective assistance of counsel by complaining of various decisions before and at trial, including the decisions not to devote more time to the study of corporate files, not to attempt to interview a witness, not to make a Rule 16 motion, not to introduce various pieces of evidence and not to have a grand jury witness assert the attorney-client privilege. The Court has reviewed each of these issues and finds that each of the decisions, far from demonstrating gross negligence, was well within the range of competence demanded of attorneys in criminal cases. The facts here bear no resemblance to those in the case cited by petitioner, *Ray v. Rose*, 491 F.2d 285 (6th Cir. 1974). The attack petitioner makes upon his counsel is tantamount to a hindsight reappraisal of his defense and the preparation for it. A *coram nobis* petition will not lie to review the tactics complained of here. *See Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951); *Lampe v. United States*, 288 F.2d 881, 882 (D.C. Cir. 1961) (en banc).

To demonstrate that his counsel were disloyal, petitioner alleges his belief that they were "threatened with prosecution" in various matters involving the SEC. The implication, never stated, was that his counsel allowed the United States Attorney and the SEC to convict petitioner in exchange for their own freedom from prosecution. The proof offered is twofold. The first is the fact that neither counsel was indicted although Glickstein was an unindicted co-conspirator in the later Merritt-Chapman case and petitioner

believes there was a "criminal reference report" which recommended prosecution of Mr. Gould in connection with the Canadian Javelin case. The second is a speech-article by Dean Monroe Freedman of Hofstra School of Law, one proposition of which is that the New York securities bar is overly compliant to SEC wishes.

Petitioner further alleges that his trial attorney, and two partners, had proprietary interests in a New York stock exchange firm in the sixties, possibly while Mr. Gould represented petitioner. Petitioner's theory here apparently is that interest in such a firm, "very closely regulated by the S.E.C.," would necessarily taint Mr. Gould's representation of petitioner in a securities trial. This is a patently insufficient claim of conflict of interest.

Even if, contrary to the findings made above, the counsel's actions complained of had been of a nature to suggest ineffective representation, the evidence presented (assuming there was a criminal reference report) is far too paltry to warrant the gigantic leap from less-than-perfect representation to the affirmative deliverance (deliberate or otherwise) of petitioner into the hands of the prosecutor for personal reasons. The Court cannot let itself be carried this far by petitioner's suspicions and fears. Petitioner was well served at trial by Mr. Gould, a distinguished member of the New York bar, and Mr. Glickstein of Jacksonville, Florida, petitioner's old friend and associate who acted as his house counsel and was one of his witnesses at trial. His attack on their representation of him does not approach a showing of "deliberate abdication of [their] ethical duty to [their] client."

Since it reaches this conclusion, the Court declines to grant items (d), (e) and (f) of petitioner's Motions for Discovery.

The Alleged Conflicts of Interest of Paul Grand and Arthur Liman

The petition makes the utterly unfounded statement that Mr. Grand was "one of the prosecutors in the Continental case." Mr. Grand's affidavit demonstrates that he played no role in the trial or appeal of the Continental case. He became chief trial counsel for the Government in the Merritt-Chapman case, which has no relevance to this petition, in February 1968, approximately a year and a half after petitioner's indictment in both cases and approximately 5 months after the jury found petitioner guilty in the Continental case. His only role in the Continental case was to represent the Government on the petitioner's motion for a new trial in October 1968, over a year after petitioner's conviction.

The conflict of Mr. Grand is predicated on an alleged relationship between petitioner's co-defendant Gerbert and Mr. Grand's father, from 1955 to 1957, while both were directors of a corporation in St. Louis, Missouri. Mr. Gerbert says the relationship was marked by "continuous disagreements" culminating in "a very heated argument," Mr. Grand *pere's* forced removal from the board, and "much bitterness all around." Mr. Grand *fils* states that he was away from home in the Army and law school during this period and his "knowledge of the business relationship between Mr. Gerbert and my father has always been almost non-existent." On these facts this Court must conclude that this conflict is not only unrelated to this petition but is also too nebulous, absent a showing of harm, to warrant relief in any case. This is another instance of petitioner's attempts to lump the two prosecutions together despite the repeated orders of this Court.

Mr. Liman acted as attorney for a co-defendant in the Merritt-Chapman case. He had nothing to do with the

Continental Enterprises case. What has already been said with respect to the attack on Mr. Grand applies equally here.

The Alleged Conflict of Interest of Paul Galvani

Mr. Galvani, now a member of a Boston law firm, served at one time as law clerk to the trial court. He subsequently served as an Assistant United States Attorney between 1966 and 1970. He took no part in the Continental Enterprises case except with respect to certain pretrial motions which were heard and decided many months before trial. He was later to serve as a deputy to Mr. Grand in the Merritt-Chapman case. His relationship to the trial court was raised and summarily rejected as a ground for recusal by the Court of Appeals in *Wolfson v. Palmieri*, 396 F.2d 121, 123 (2d Cir. 1968). Here again the petitioner seeks to relitigate an issue already decided against him.

The Alleged Perjury of Allen and Morley

The petitioner attacks as perjurious the testimony of two Government witnesses, John Morley and Stuart Allen. Both claims are insubstantial.

The heart of petitioner's claim against Morley is that there are differences between Morley's testimony before the SEC in 1965 and his trail testimony and that Morley allegedly admitted to one Michael C. Holloway that he had lied before the SEC in order to support petitioner's co-defendant Gerbert. Before cross-examination of Morley, the defense was given the relevant parts of Morley's SEC testimony (Exhibit 3504A) and had sufficient opportunity to exploit any material differences between Morley's prior testimony and what he said at trial. Morley's testimony was also attacked unsuccessfully on appeal. Appellants' Brief, *United States v. Wolfson and Gerbert*, 2d Cir. Dkt. No. 31993 at 8-10; 49-50.

Petitioner is entitled to no relief on this claim. Since this matter was available for litigation at trial and on appeal, it may not be raised in this petition. Furthermore, there is no offer of proof that Morley perjured himself at trial as opposed to before the SEC. And finally, petitioner has not even attempted to show any harm to himself by Morley's allegedly perjured testimony before the SEC, which Morley is said to have labeled "a very minor thing."

Petitioner's claims relating to the excision of the 3500 material are foreclosed to him because they were available to him on appeal. Title 18 U.S.C. § 3500(c) provides a procedure for objection to and appeal from excision of material by the trial court:

> If, pursuant to such procedure [for the excision of 3500 material], any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

Petitioner's failure to avail himself of this procedure forecloses the matter to review by *coram nobis* petition.

Moreover, petitioner's excursion into the area of the 3500 material is a hollow issue. First, witness Duncan's testimony is not so easily discredited as petitioner would assume. Duncan testified that SEC lawyer Kelly met with petitioner Wolfson in 1950 and explained registration requirements to him. The fact that the meeting may have "related to 'manipulation" rather than the sale of unregistered stock – if indeed such a facile distinction can be made in this situation – is irrelevant if the meeting included this explanation of registration requirements as Duncan testified and Kelly's memorandum shows. Moreover, the SEC letter of January

11, 1951, attached to the affidavit of petitioner's counsel filed November 13, 1975, clearly shows that the Capital Transit matter involved "a secondary distribution of unregistered stock on behalf of controlling persons."

More importantly, the main thrust of this claim, as petitioner admits, relates to the "relative 'guilt' of Wolfson, the defendant, versus Morley, the prosecution witness." This is a contention that was unsuccessfully presented at trial. Petitioner appears unable or unwilling to grasp the fact that Morley's knowledge cannot exculpate the petitioner. The evidence and testimony objected to was presented to demonstrate that petitioner was aware of the registration requirements. Evidence that shows Morley to have had the same awareness proves nothing.

As with his other claims, petitioner's assertions on this issue show no error of constitutional dimensions and raise no factual dispute warranting an evidentiary hearing.

Allen, an employee of the SEC who did a great deal of work on the Continental Enterprises case, gave testimony before the grand jury with respect to interviews with the brokers at ten different brokerage houses through which Continental stock had been sold. The part of the interviews that Allen related focused on the brokers' description of their practices regarding compliance with SEC regulation of sales of unregistered stock by control persons. Petitioner claims that the testimony at trial of some of these brokers shows Allen to have been lying to, or at least wilfully misleading, the grand jury. Petitioner sets forth Allen's testimony regarding two of these brokers followed by the brokers' testimony at trial. These quotes, presumably the two examples most supportive of petitioner's position, do not even remotely suggest that Allen's testimony was either perjurious or wilfully misleading. Allen testified before the grand jury as to the general operating practices of the brokers as they recounted

them to him. At trial neither broker in any way denied those practices or that he had told Allen that those were his practices. The brokers' testimony indicates that they made only generalized inquiries to sellers of stock regarding control problems.

Petitioner's implication that Allen told the grand jury that the brokers had made extensive, detailed inquiry is unsupported by the transcript.

Allegation of Misleading the Jury

This issue had to be, and was, raised on direct appeal. See Appellants' Brief, *United States v. Wolfson and Gerbert,* 2d Cir. Dkt. No. 31993 at 15. Since petitioner has presented no new facts regarding this claim, it cannot be raised anew.

Allegations of an SEC "Enemies" List, Discriminatory Prosecution and Impermissible Prosecutorial Purpose

Even if an SEC "Enemies" list existed and petitioner's name was on it, the petitioner would not be entitled to relief. He has not shown that he was injured or prejudiced thereby other than to assert that "the very purpose of such lists was to harass and, where possible, jail those who were placed thereon, whether guilty of a crime or not." This unsupported assertion cannot warrant vacating a conviction by a unanimous jury verdict. And the occurrence of the concatenation of events collectively known as Watergate does not offset the fact that, as petitioner concedes, the issue of discriminatory prosecution has already been litigated.

The charge of impermissible prosecutorial purpose in this case is equally unsupported. The extensive account of petitioner's life, work and speeches proves nothing. He has conceded that the change of venue issue has been litigated.

And the third-hand hearsay statements that reportedly were made by officials of the Department of Justice all refer to the Merritt-Chapman case and are irrelevant here.

Conclusion

This petition presents a hodge-podge of matters relating to two criminal proceedings of which only one ended in a judgment of conviction. They are frequently repetitions of matters already litigated. They seek, in some instances, to raise issues that could have been availed of at trial or on appeal. In many instances, particularly where perjury and conflicts of interest are charged, the factual bases are lacking and the assertions of the petitioner are based upon conclusory allegations and innuendoes. Recognizing the weakness of his claims, petitioner has taken the stance that "his constitutional right to a fair trial was not denied by any one particular 'point,' but that the totality of the denials clearly adds up to a lack of due process under law." This Court does not accept the premise that legally insufficient allegations can be summed to total a claim sufficient to overturn at this late date a thoroughly contested and appealed jury verdict. Moreover, the petition, considered *in toto*, does not present "circumstances compelling [a grant of relief] to achieve justice." *United States v. Morgan, supra,* 346 U.S. at 511. For these reasons, and because of petitioner's failure to obey the repeated orders of the Court with respect to the submission of his contentions, this petition must be denied.

Petition denied in all respects. It is so ordered.

Dated: New York, N. Y.
July 26, 1976

Edward L. Palmieri

EDMUND L. PALMIERI
U. S. D. J.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -x

LOUIS E. WOLFSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- - - - - - - - - - - - - - - - -x

66 Civ. 720 (LPG) *

MEMORANDUM DECISION

GAGLIARDI, D.J.

Petitioner Louis Wolfson commenced this action seeking a writ of error *coram nobis* pursuant to 28 U.S.C. §1651, or alternatively an evidentiary hearing on the factual issues raised in the petition. Petitioner was convicted on September 28, 1967, after a jury trial before Hon. Edmund L. Palmieri and found guilty of violating the registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C. §77e ("Securities Act") in connection with the sale of stock of Continental Enterprises Inc. ("Continental"). *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. September 28, 1967), *aff'd*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

Since 1967, petitioner has persistently sought to set aside this judgment by a variety of post-conviction remedies. On

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*** Judge Gagliardi's original opinion contains a typographical error incorrectly referring to the civil docket. The opinion, however, was filed in Wolfson's criminal case, and it is listed as a ciminal opinion throughout this brief in opposition.**

October 10, 1968, petitioner moved for a new trial on the ground of newly discovered evidence.[1] Judge Palmieri denied the motion. *United States v. Wolfson*, 297 F. Supp. 881 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804 (2d Cir. 1969). On May 16, 1975, having served his prison term and paid the fine imposed, petitioner filed his first petition for a writ of error *coram nobis*. The petition was denied by Judge Palmieri on both the merits and for petitioner's failure to follow the court's directions pursuant to Rule 41(b), Fed. R. Civ. P, *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976), *aff'd*, 558 F.2d 59 (2d Cir. 1977). In the instant petition, Wolfson alleges that newly discovered evidence, obtained under the Freedom of Information Act, as amended, 5 U.S.C. §552, and as a result of court orders, warrants the relief sought. For the reasons set forth below, the petition is denied.

I. Statements of Facts

Petitioner's conviction for violating Section 5 of the Securities Act required a finding that he acted knowingly. The government established this element of the offense in large part through the testimony of John J. Morley, Wolfson's stockbroker for over twenty years, and James Duncan, a former employee of the Securities and Exchange Commission ("S.E.C."). Duncan testified concerning a memorandum[2] that was prepared after Wolfson's appearance at the S.E.C. in 1950 in connection with an S.E.C. investigation of Capital Transit Company ("Capital"), a company that

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[1] Petitioner challenged the authenticity of a memorandum introduced by the governemnt at trial and labeled Government Exhibit 21. Judge Palmieri denied the motion after an extensive evidentiary hearing. Petitioner raises a new challenge to the government's use of the memorandum in the instant petition, as discussed *infra*.

[2] This is the same memorandum referred to in note 1, *supra*.

Wolfson controlled in the early 1950's. Since petitioner's present claims relate in part to the Capital investigation, the events surrounding that investigation must first be reviewed.

a. Capital Investigation

In 1949, Wolfson, members of his family and close associates purchased a controlling interest in Capital. During 1950, the market value of the stock increased substantially, triggering an S.E.C. investigation. The official S.E.C. order, dated September 20, 1950, directed an investigation into sales of Capital stock by certain named individuals who were believed to be members of the control group of Capital. The order identified petitioner as a member of the control group although it did not name him specifically as a target of the investigation. On October 12, 1950, petitioner and an associate made an appointment to speak with E. Russel Kelly, the Regional Administrator of the S.E.C. The meeting was also attended by Duncan, an assistant supervisor of the S.E.C. After the meeting, Kelly prepared an eight page memorandum "to the file," stating, *inter alia*, that petitioner and his associate had learned about the investigation, and that they were both concerned about rumors, potentially damaging to the company, that the stock was manipulated or the market rigged. According to the memorandum, the two hour conversation included a discussion of section 5 registration requirements and definitions of "control persons." Although the Capital investigation uncovered violations of the Securities Act and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("Exchange Act"), the S.E.C. decided to take no official action against any of the persons involved. The S.E.C.'s investigation also focused on the practices of the broker-dealers through whom the Wolfson group had sold their shares of Capital stock. Following its decision not to prosecute, the S.E.C. sent letters of censure to the broker-dealers involved, including A. M. Kidder and Co. ("Kidder"),

requesting that they institute procedures to insure that there would be no future violations of Section 5.

b. Continental and Merritt-Chapman Investigations and Trial

In 1954, Continental was spun off from Capital, with Wolfson becoming its major shareholder. In 1962, Continental stock rose from $1 per share to $8 per share and thereafter dropped back to $1 per share. Prior to the decline, petitioner and an associate, Elkin B. Gerbert sold a substantial portion of their holdings. Between 1960-65, petitioner and members of his group were also trading in the stock of Merritt Chapman and Scott Corporation ("Merritt Chapman") in which they likewise held controlling interests. The S.E.C. commenced investigations into petitioner's activities in Continental and Merritt Chapman in 1965. Morley, a broker with Kidder and later with Reynolds and Co. ("Reynolds") after it acquired Kidder in 1963, was petitioner's principal stockbroker during this entire period. On October 18, 1965, in connection with the Merritt Chapman investigation, the S.E.C. examined Morley. Anthony Englese, in-house counsel for Reynolds, accompanied Morley and purported to represent him before the S.E.C. During the examination, which generated a 105 page transcript, Morley was questioned about his practices and those of his firms when trading in stock of Continental, Merritt Chapman and Capital. Inquiry was made into Morley's knowledge of the S.E.C. investigation of Capital trading in 1950-52. He was also asked whether or not he knew about a memorandum that Kidder circulated to its employees in 1950 setting forth the requirements for brokers' compliance with the Securities Act and demanding strict adherence to those requirements by Kidder employees.

On September 14, 1966, Joseph M. Glickstein, petitioner's attorney for many years, was scheduled to testify before the

grand jury in relation to the Merritt Chapman investigation. In order to avoid encroaching upon matters within the scope of the attorney-client privilege, the Assistant United States Attorney met with Glickstein in the presence of Milton Gould, Esq., who represented Wolfson in the Continental case, to discuss any problems relating to privileged issues that might arise. Glickstein was assured that no attempt would be made to invade privileged areas and that the government was seeking Glickstein's testimony only in connection with his attendance at Merritt Chapman executive committee meetings. Gould accompanied Glickstein to the grand jury.

Petitioner and Gerbert were indicted on September 19, 1966 for violating Section 5 of the Securities Act in connection with their sales of Continental stock. They were both convicted on all counts. The government called Morley as a witness at the trial to testify regarding procedures he and his firm followed in handling transactions for petitioner and his associates. Morley stated that he and his firm were very conscientious about adhering to the Securities Act's restrictions on sales by control persons, that the firm rejected those sales that would violate the prohibitions and explained the restrictions to petitioner and his affiliates. Following Morley's direct examination, the government made available to petitioner's counsel the transcript of Morley's S.E.C. interview, as required by 18 U.S.C. §3500. The government requested, however, that pages which in its view did not relate to the subject of Morley's testimony at trial be excised. Judge Palmieri granted the government's request, and concurred in its determination of the pages to be deleted, with one exception: he ruled that the government turn over the page on which Morley stated that Englese was representing him. The deleted pages of Morley's testimony made reference to the 1950-52 Capital investigation and the Kidder memorandum. Petitioner's counsel cross-examined Morley

extensively, pointing out inconsistencies in his testimony before the S.E.C. and at trial, as well as eliciting admissions of his non-compliance with the Securities Act. The prosecution questioned Wolfson about the meeting with Kelly in 1950. When Wolfson denied a recollection of the meeting, the government introduced as rebuttal evidence the memorandum prepared by Kelly. Duncan testified as to his recollection of the meeting after reading the memorandum which was also introduced into evidence.

Petitioner raised numerous claims of error on appeal from his conviction, including several relating to interpretation of the Securities Act sections which he and Gerbert were charged with violating. The Second Circuit considered and rejected these claims. In addition, petitioner objected to the prosecutor's summation to the jury. After discussing specific objections, the court stated, "without going into greater detail it will suffice to say that reading the prosecuting attorney's entire summation in conjunction with the court's charge discloses no reversible error." *United States v. Wolfson, supra,* 405 F.2d at 785. It appears that petitioner did not claim, as he was entitled to in accordance with 18 U.S.C. §3500(c), error in the district court's ruling that the government could withhold portions of Morley's S.E.C. testimony.

During the pendency of the appeal to the Second Circuit, Judge Palmieri denied petitioner's motion for a new trial based on a challenge to the authenticity of the Kelly memorandum. In connection with the motion, petitioner requested the S.E.C. files of the Capital investigation, labeled W525 and W557, from which the memorandum had been taken. Although Judge Palmieri denied this request, he ruled that petitioner was entitled to certain documents from these S.E.C. files. On appeal, petitioner claimed error in the district court's denial of his broader discovery motion. Rejecting petitioner's claims, the Second Circuit held that the

district court did not err in denying petitioner access to the complete files covering investigations W525 and W557. *United States v. Wolfson, supra,* 413 F.2d at 808.

Following his conviction in the Continental case, petitioner was indicted and tried for Exchange Act violations in connection with the purchase and sale of Merritt Chapman securities.[3] In the course of that 1968 trial, petitioner gained access to the excised pages of Morley's S.E.C. testimony.

c. First Coram Nobis Petition

On May 16, 1975, petitioner filed his first *coram nobis* petition, seeking to set aside his conviction in the Continental case. The petition raised a myriad of claims, all of which Judge Palmieri entertained and rejected. Included were claims which reappear in the instant petition, albeit in a different guise. Petitioner argued, in his first *coram nobis* petition, as he had in the motion for a new trial and on appeal from the denial of that motion, that the prosecutor wrongfully withheld the S.E.C. files containing potentially exculpatory material. Petitioner once more asserted prosecutorial misconduct in the summation. Specifically, petitioner stated that the prosecutor knew that Wolfson had not been a defendant or prospective defendant in the Capital investigation and yet had deliberately misled the jury into believing that he had avoided prosecution and that the jury "should not let it happen again." (Petition at 34). Petitioner also raised a broad claim of ineffective assistance of counsel citing many specific instances; one particular grievance related to Glickstein's grand jury appearance, and counsels'

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[3] A divided Second Circuit reversed Wolfson's conviction in the Merritt Chapman case. *United States v. Wolfson,* 437 F.2d 862 (2d Cir. 1970). After two subsequent trials which resulted in hung juries, petitioner entered a plea of *nolo contendere* to one count and paid a fine imposed by the court.

failure to notify petitioner of the appearance in advance. A second grievance involved Gould, who petitioner claimed was the subject of a "criminal reference report" which recommended his prosecution for an unrelated matter. Petitioner further claimed that Morley's testimony at trial or before the S.E.C. was perjured, a fact which was known to the prosecutor. And finally, petitioner asserted that the prosecutor wrongfully excised material in violation of 18 U.S.C. §3500. Judge Palmieri denied petitioner relief on all claims. He rejected the claims of improperly withheld material as untimely, not having been raised on appeal in accordance with 13 U.S.C. §3500(c). *United States v. Wolfson, supra,* No. 66 Cr. 720 at 28. He ruled that the claim of Morley's perjury was insubstantial and further that it had previously been raised on appeal. *Id.* at 27. As to the claim of improper summation, he stated that it, too, had been raised and rejected on appeal. *Id.* at 31.

The Second Circuit affirmed the denial of the coram nobis petition. *United States v. Wolfson, supra,* 558 F.2d 59. Although petitioner initially raised three issues on appeal, he subsequently abandoned the claim asserting error in the withholding of Morley's S.E.C. testimony, see *United States v. Wolfson, supra,* 558 F.2d at 64,n.18. The Second Circuit examined and rejected the claims involving Glickstein and Gould. With reference to the assertion that Gould was a subject of investigation, the court stated that the petition "presented little, aside from [petitioner's] own speculations, in support of the claim." *United States v. Wolfson, supra,* 558 F.2d at 65. The court devoted considerable discussion to the alleged impropriety of Glickstein's grand jury appearance prior to petitioner's indictment by the same grand jury. The court concluded:

> Wolfson's counsel claimed to have invoked the attorney-client privilege where appropriate and there is nothing

> to indicate that this is not so. And even if there were a violation of the attorney-client privilege, appellant concedes that he is unable to find any case in which such a violation has resulted in dismissal of an indictment or even in a new trial.

Id. at 66.

d. Discovery Motions

Petitioner next filed three motions in the district court on November 10, 1977, seeking, *inter alia*, a court order pursuant to Rule 6(e) of Fed. R. Crim. P. permitting disclosure of the minutes of Glickstein's grand jury testimony. Judge Palmieri stated that any claims relating to Glickstein's appearance should have been raised on appeal from conviction. The court also stated that it had examined the minutes *in camera* and had concluded that the claim of improper representation would not be supported by anything which had occurred before the grand jury. In fact, the court stated "petitioner's rights were assiduously protected both by the Assistant United States Attorney and by the witness's invocation of the attorney-client privilege." *In re Wolfson*, M 23-7/77 (S.D.N.Y. June 15, 1978) at 16. Nevertheless the court issued an order directing that the transcript be made available for copying by petitioner, stating that its decision was "primarily motivated by the desire to dispel the atmosphere, however groundless, of suspicion and accusation which ha[d] prevailed for too long in this litigation." *Id.* at 17.[4]

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[4] Judge Palmieri was the object of several recusal motions during the course of the thirteen years of Wolfson litigation in the courts of the Second Circuit and Southern District. See e.g. *United States v. Wolfson*, *supra*, 558 F.2d at 60-64; *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Wolfson v. Palmieri*, 394 F.2d 7 (2d Cir. 1968). In affirming Judge Palmieri's denial of the first *coram nobis* petition, the Second Circuit, which had supported Judge Palmieri in his refusals to recuse himself,

II. Discussion

With the foregoing as background, this court now examines the claims before it. Wolfson argues that he has discovered new facts through recently obtained evidence heretofore unavailable to him, which would have resulted in his acquittal had the facts been known during the Continental trial.

The "critical" newly discovered evidence is as follows: (1) S.E.C. documents and files relating to the Capital and Merritt investigations; (2) the memorandum prepared by Kidder at the time of the Capital investigation; (3) the deposition of Anthony Englese, who represented Morley at his appearance before the S.E.C. in 1965; and (4) the transcript of Glickstein's testimony before the grand jury.

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suggested that if there were any further proceedings in the Wolfson case that Judge Palmieri should consider voluntarily recusing himself. *United States v. Wolfson, supra,* 558 F.2d at 64, n. 17.

Judge Palmieri responded at length to the Second Circuit's suggestion in his opinion in *In re Wolfson,* No. M 23-7/77 (S.D.N.Y. June 15, 1978). Setting forth his reasons for denying the motion for recusal which was again then before him, Judge Palmieri stated:

> Petitioner's exhaustive post-conviction efforts have caused a considerable expenditure of judicial resources, to say nothing of the time and expense inflicted upon the United States Attorney and related agencies. He has left in his wake massive and complex records which would impose a heavy burden on any judge of this court assigned to the case. All of the Assistant United States Attorneys familiar with these proceedings have resigned and the Court understands that this is largely true with respect to the personnel of the Securities and Exchange Commission. The efficient administration of justice would have been frustrated by a decision to disqualify.

Id. at 8. Nevertheless, Judge Palmieri went on to state:

> [A]fter ruling on the motions presently *sub judice* and filing this opinion, this Court will address the Assignment Committee...and

Petitioner states that the S.E.C. files revealed that Kidder and Morley were subjects of the 1950 investigation, and even more relevant, that he was not. Therefore, access to the files, according to Wolfson, would have enabled him to refute the prosecutor's improper innuendos linking him to the 1950 Capital investigation which misled the jury into believing that petitioner had been guilty of the same Section 5 violations in 1950. Petitioner alleges that the Kidder memorandum reveals that Kidder had been the subject of investigation by the S.E.C. in 1950, and that in addition, it is evidence of Morley's knowledge and subsequent blatant disregard of the Securities Act's requirements. The Englese deposition demonstrated that Englese misled the S.E.C. when he accompanied Morley in 1965 into believing that he was Morley's counsel rather than in-house counsel for Reynolds. Englese' deposition also revealed that he had accom-

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request that any further responsibility for these proceedings be assigned to another judge of this Court.

Id. at 10.

The instant petition was then assigned to this court. Although viewing the claims before it dispassionately, this court cannot fail to be aware of the history of the case, if only because the court has been required to locate, assemble, and review extensive records in order to analyze the repetitive claims that have been presented. Were this a habeas petition, the court would have recourse to a provision in 28 U.S.C. §2254 (and 28 U.S.C. §2255), which reads:

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rules Governing §2254 Cases, Rule 9. The court is not aware of an analogous provision in 28 U.S.C. §1651 authorizing the dismissal of a petition which the court considers to be an abuse of the writ of error coram nobis. For this reason, and also in order to present as full a record as possible, the court has considered every issue raised by petitioner.

panied Morley to the office of the Assistant United States Attorney who prosecuted the Continental case. From these facts, petitioner argues that the government and Reynolds entered into a deal trading Morley's testimony for Reynolds' immunity from prosecution for its own Securities Act violations. And finally, petitioner states that Glickstein's grand jury transcript supports the previously raised claim of ineffective assistance of counsel. In sum, petitioner asserts, citing *Brady v. Maryland*, 373 U.S. 83 (1963), that his Fifth Amendment due process rights were violated as a result of the prosecutor's "fraudulent representations to the trial court [which] deceived Judge Palmieri into excising critical pages of the testimony before the S.E.C. in 1965 by John Morley, a key prosecution witness." In addition to this Fifth Amendment claim, petitioner asserts a Sixth Amendment violation as a result of Glickstein's grand jury appearance. These claims will be considered *in seriatim* after a review of the applicable standards for reviewing a petition for a writ of error *coram nobis*.

A writ of error *coram nobis* is an extraordinary remedy that is invoked to vacate a judgment of conviction only where there has been a fundamental error of fact rendering the proceedings irregular and invalid. *United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Mayer*, 235 U.S. 55 (1914); *United States v. Keogh*, 417 F.2d 885 (2d Cir. 1969); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968). The purpose of the writ is "to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment." *Allen v. United States*, 162 F.2d 193, 194 (6th Cir. 1974). The factual matters to be reviewed must be of the utmost gravity. *United States v. Malinsky*, 310 F. Supp. 523 (S.D.N.Y. 1970). Equally well settled is the principle that the petitioner is entitled to an evidentiary hearing only if he raises a

material issue of fact on a claim of constitutional dimensions. *United States v. Carlino*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013; *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961).

This court must also be mindful of proscriptions against repetitive litigation. Issues that have been adjudicated upon trial or appeal may not be raised in a collateral attack. See *Murgia v. United States*, 448 F.2d 1275, 1276 (9th Cir. 1971); *Stein v. United States*, 390 F.2d 625 (9th Cir. 1968). "It is hornbook law by now that a Section 2255 motion [the modern equivalent to *coram nobis*] may not be used to relitigate matters not only decided, but which could have been presented, on direct appeal, nor may the section be applied in a collateral attack based upon a fragmentized claim which petitioner raised in a slightly different fashion at his trial and upon appeal." *Williams v. United States*, 334 F. Supp. 669, 671 (S.D.N.Y. 1971), aff'd, 463 F.2d 1183 (2d Cir. 1972), *cert. denied*, 409 U.S. 967 (1972) (citations omitted). See *Polizzi v. United States*, 550 F.2d 1133 (9th Cir. 1976).

A. Fifth Amendment Brady Claim

Petitioner argues that the government violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963) by deliberately suppressing portions of Morley's S.E.C. testimony. That testimony, petitioner contends, in conjunction with the Kidder memorandum, would have enabled the defense to convince the jury that Morley had willfully violated the Securities Act, thus placing the credibility of the government's key witness in question. The result, according to petitioner, would have been a reasonable doubt of petitioner's guilt in the jury's mind sufficient to obtain an acquittal. Although petitioner asserts that the excised pages led to the suppression of other relevant and exculpatory material, such as the Kidder memorandum and the S.E.C. investigative file, the

claim, stripped to its bare essentials, is simply one of violation of 18 U.S.C. §3500.[5] As such, this court is barred from addressing the merits of this claim on several grounds. First, the trial court, at defense counsel's request, examined the excised portions *in camera* and preserved the transcript for review by the Court of Appeals, in accordance with 18 U.S.C. §3500(c). However, petitioner failed to raise the propriety of the court's ruling on appeal. Furthermore, petitioner's claim that Morley's suppressed testimony would

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[5] In *Brady v. Maryland*, 373 U.S. 83 (1973), the court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968), the Second Circuit applied the rule to a *coram nobis* petition. The court first reviewed guidelines for a habeas attack on a conviction when the defense has discovered after trial that a prosecutor withheld exculpatory material from a defendant at trial. The court distinguished three categories of cases and the requisite showing of materiality required by petitioner in each category to entitle him to post-conviction relief: (1) when the prosecutor deliberately withholds evidence which he knows would be of great value to the defendant, the evidence is, by definition, of such great importance that there is no question that the defendant was prejudiced, *id.* at 146-47; (2) when the prosecutor suppresses evidence favorable to the accused after his request, the evidence must be material to guilt or punishment regardless of the good or bad faith of the prosecutor, *id*, at 147, *citing Brady v. Maryland*, *supra*; and (3) when the prosecutor inadvertently suppresses material which it later appears the defendant could have used, there must be a high showing of materiality, *United States v. Keogh*, *supra*, 391 F.2d 147. The court held that a *coram nobis* petition required a high showing of materiality to entitle the petitioner to post-conviction relief, *id.* at 147, and further stated."it is only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror that justice compels the invalidation of the conviction." *id.* at 148. See also, *United States v. Keogh*, 440 F.2d 737, 741 (2d Cir. 1971). As the ensuing discussion reveals, this court does not find that the allegedly withheld evidence would have been of any benefit to petitioner at trial, much less that it would have raised a reasonable doubt as to his guilt.

have enabled him to impeach Morley's credibility was asserted in his first petition for a writ of error *coram nobis*. Judge Palmieri rejected the claim because petitioner had an opportunity to remedy any error on appeal from his conviction. Notwithstanding this deficiency, the trial court considered the merits of the claim. Labeling "petitioner's excursion into the area of the 3500 material...a hollow issue," *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976) at 28, Judge Palmieri continued:

> The main thrust of this claim, as petitioner admits, relates to the "relative 'guilt' of Wolfson, the defendant, versus Morley, the prosecution witness." This is a contention that was unsuccessfully presented at trial. Petitioner appears unable or unwilling to grasp the fact that Morley's knowledge cannot exculpate the petitioner. The evidence and testimony objected to was presented to demonstrate that petitioner was aware of the registration requirements. Evidence that shows Morley to have had the same awareness proves nothing.

Id. at 29. Petitioner did not pursue this claim on appeal from the denial of the petition. *See* 558 F.2d at 64, n. 18. Despite the fact that the claim of improper redaction of 3500 material was not raised at the appropriate time, it was nonetheless considered and rejected on the merits by Judge Palmieri. Under any standard of *coram nobis* review, this court may not consider it again. *Williams v. United States*, *supra*, 334 F. Supp. at 671.

Petitioner would fare no better if this court were to consider the merits of the claims relative to the allegedly suppressed material. The Kidder memorandum is a six page review of the Securities Act requirements, prepared by Kidder in 1950, in conjunction with the S.E.C., for distribution to its personnel involved in the sale of securities. This court cannot conceive of any possible theory under which

petitioner's possession of that document at trial would have caused a different result. Petitioner argues that the memorandum would have been evidence that Morley knew of and later defied the Securities Act requirements, and also that the S.E.C. had investigated Kidder. Morley's knowledge is not contradictory to his position at trial; in fact he testified that he conveyed this knowledge to petitioner. And, too, Morley admitted before the S.E.C., which admissions were included in the redacted version of his testimony in court, that he had violated the Act and had been censured by his firm. Furthermore even if Morley and Kidder *had* violated the Securities Act in 1950, that fact could not have so discredited Morley in 1967 so as to have affected the outcome of the trial. And finally, Morley's credibility had been attacked at trial by the demonstration of inconsistencies between his S.E.C. and trial testimony. This renewed attack on Morley's credibility, raised through this "newly discovered evidence", entitles petitioner neither to an evidentiary hearing, *see United States v. Tribote*, 297 F.2d 598, 600 (2d Cir. 1961) nor to a writ of error *coram nobis* vacating his conviction. *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968).

Petitioner also asserts that the previously withheld S.E.C. files of the Capital investigation, which contained the Kidder and Kelly memorandum are important "newly discovered evidence" because they allegedly support the claim that the prosecutor deliberately misled the jury during the summation. A similar argument was raised and rejected in the first *coram nobis* petition on the ground that even at that point in the proceedings it had been previously considered. See petition for a Writ of Error *Coram Nobis*, May 16, 1975 at 34-35; *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976) at 31. Nothing in the files adds weight to the argument, which is revealed on close examination to be not only

implausible but disingenuous. Had all the facts surrounding the Capital investigation been known, according to petitioner, the jury would have believed him when he said he didn't remember anything about the meeting with Kelly. After all, why would he be expected to remember a meeting of so little consequence to him. The argument is flawed because, in the first instance, the prosecutor's statement did not create the "totally false impression" that Wolfson was the target of an investigation in 1950. The challenged portion of the summation reads:

> [T]here is an additional significance to this document [Exhibit 21], and that is that Mr. Wolfson did take the stand,...and he sat there and he tried – he had the nerve to try to put over on this jury the idea that he was as innocent today as he pretended to be on (October 12, 1950).[6]

(Trial transcript at 2453). According to the Kelly memorandum, Wolfson told Kelly at the meeting that he knew nothing about the Securities Act and the registration requirements. The prosecutor's statement fairly describes Wolfson's professed lack of knowledge. And although not named as a target of the investigation, the S.E.C. files describe the nature of Wolfson's interest in the company being investigated. The jury would have expected Wolfson to remember a two hour meeting with an S.E.C. official that was precipitated by an investigation into the company which he controlled. This court concludes that nothing in the S.E.C. files would have changed the jury's assessment of Wolfson's credibility with respect to the Kelly meeting, nor his culpability in the Continental case.

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[6] The transcript erroneously states August 12, 1950; however, the meeting was on October 12.

Petitioner claims that the Englese deposition is probative of the deal between Morley, Reynolds and the government. However, petitioner does not support this accusation by specific reference to any statements of Englese, nor is this court able to discern the existence of such a deal by its reading of the deposition testimony. The court concludes that the allegations are pure speculation, and as such cannot entitle petitioner to any relief. *Accardi v. United States*, 379 F.2d 312, 313 (2d Cir. 1967); *United States v. Tribote, supra*, 297 F.2d at 601.

B. Sixth Amendment Ineffective Assistance of Counsel Claim

a. Glickstein

In reviewing the denial of the first *coram nobis* petition, the Second Circuit carefully considered and rejected petitioner's claim that Glickstein's grand jury appearance denied Wolfson his Sixth Amendment rights. The court noted that "Wolfson's counsel claimed to have 'invoked the attorney-client privilege where appropriate,' and there is nothing to indicate that this is not so." *United States v. Wolfson, supra*, 558 F.2d at 66. The court held that the claim "had insufficient factual support of likelihood of ultimate success." *Id.* Upon petitioner's 1977 post-trial motion, Judge Palmieri reviewed the transcript and concluded that there had been no violation of the attorney-cient privilege but, nevertheless, granted petitioner's motion. On the basis of having seen the transcript, petitioner now renews this claim. This court has also reviewed the transcript, and agrees with Judge Palmieri that it reveals that Glickstein conscientiously and carefully protected any privileged information from disclosure. The court therefore finds that the claim is baseless.

b. Gould

Petitioner again raises the spectre of a secret deal between the S.E.C. and Gould to overturn a twelve year old conviction. The claim has been previously considered and rejected; in the first coram nobis petition and on appeal from that decision. It is therefore inappropriate for this court's review. The merit of the claim is further diminished by Gould's sworn statement of April 10, 1978, in which he asserts that he has no knowledge that he was ever a target of an S.E.C. investigation in the matter alleged or any other matter. (Government's exhibit B).

III. Conclusion

Petitioner has again attacked his conviction by attempting to undermine the evidence introduced against him at his trial. He states "[w]hat a difference at the trial if Morley's credibility could have been destroyed and the memo introduced through Duncan refuted!!!" (Petition at 6). Although this court neither heard the testimony nor viewed the exhibits as they were introduced, it has reviewed substantial portions of the trial record as they relate to the issues before it. The court need not speculate as to whether either of the conditions hypothesized by petitioner would have indeed led to a different result because the court cannot agree with petitioner that he has uncoverd facts which would have led unalterably to the destruction of Morley's credibility or to the discrediting of the S.E.C. memorandum. Accordingly, the petition is denied.

So Ordered.

Lee P. Gagliardi

U. S. D. J.

Dated: New York, N.Y.
February 20, 1980